

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

DEC -7 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0221-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ROBERT FRED LESKOVSKY,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-31215

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert Fred Leskovsky

Florence
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Robert F. Leskovsky was convicted after a jury trial of furnishing drugs to four individuals, two of whom were minors, and sexual conduct with a minor. His sentences included multiple life terms of imprisonment. This court affirmed the convictions

and the sentences on appeal and denied relief on claims raised in his consolidated petition for review of the denial of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. *State v. Leskovsky*, Nos. 2 CA-CR 91-0577, 2 CA-CR 92-0727-PR (consolidated) (memorandum decision filed Mar. 23, 1993). Subsequently, this court upheld the trial court's denial of relief on claims Leskovsky had raised in his second Rule 32 petition. *State v. Leskovsky*, No. 2 CA-CR 2002-0443-PR (decision order filed June 10, 2004). In this petition for review, Leskovsky challenges the trial court's order denying relief on the following claims raised in his third Rule 32 petition: he was "actually and constructively" denied his right to counsel, in violation of the Sixth Amendment, and that *State v. Torres*, 208 Ariz. 340, 93 P.3d 1056 (2004), was a significant change in the law as contemplated by Rule 32.1(g), Ariz. R. Crim. P. Because Leskovsky has not established the court abused its discretion in denying relief or in denying Leskovsky's motion for rehearing, *see State v. Watton*, 164 Ariz. 323, 326, 793 P.2d 80, 83 (1990), we deny relief.

¶2 The gravamen of Leskovsky's claim is that, by the time of trial, his relationship with counsel had so deteriorated that there was a "conflict of interest" between them and he was effectively left without counsel. He maintains that he brought the problem to the trial court's attention three times and that the court rejected his repeated requests for a change of counsel "without any inquiry into the reason for the request." Leskovsky argues that *Torres*, which requires a trial court to conduct a hearing on a defendant's claim that he is entitled to new counsel based on a disintegration of the attorney-client relationship, 208

Ariz. 340, ¶¶ 7-8, 93 P.3d at 1059, was a significant change in the law for purposes of Rule 32.1(g) and that he is entitled to a new trial.

¶3 Denying Leskovsky relief without an evidentiary hearing, the trial court found his claims precluded and ruled that *Torres* did “not require further evidentiary hearings in this matter.” The trial court agreed with and adopted the state’s position set forth in its opposition to the Rule 32 petition.¹ Quoting portions of *State v. Sepulveda*, 201 Ariz. 158, ¶ 6, 32 P.3d 1085, 1087 (App. 2001) (citations omitted), the state had asserted *Torres* was not a “watershed rule of criminal procedure that implicates the fundamental fairness of the trial.” The state also asserted that the court had, in fact, conducted a hearing at which the issue of Leskovsky’s representation was addressed and noted that Leskovsky had attached to his petition the relevant portions of the transcript. The state maintained that the kind of hearing required by *Torres* had thus taken place. The trial court also denied Leskovsky’s motion for rehearing.

¶4 Leskovsky has not sustained his burden on review of establishing that the trial court abused its discretion when it denied relief without an evidentiary hearing. *See generally Watton*, 164 Ariz. at 325, 793 P.2d at 82. Leskovsky raised claims of ineffective assistance of counsel in his first and second Rule 32 petitions. The claim raised in this

¹The trial court noted the state’s opposition had been untimely filed but refused Leskovsky’s requests to strike it. In its order denying post-conviction relief, the court considered the opposition “[i]n its discretion . . . [n]oting the holidays” and previous extensions granted in favor of Leskovsky. Leskovsky has not persuaded us that the trial court abused its discretion.

proceeding was, at its heart, also a claim of ineffective assistance of trial counsel. Leskovsky was therefore precluded from raising this claim because he had either raised it previously or waived it by failing to raise it when he had the opportunity to do so. *See* Ariz. R. Crim. P. 32.2; *see also State v. Swoopes*, 216 Ariz. 390, ¶¶ 23-24, 166 P.3d 945, 952-53 (App. 2007).

¶5 Leskovsky insists, however, that he is not contending counsel was ineffective; rather, he asserts this is an entirely different claim—namely, that, because of the conflict that existed between him and his counsel, he was actually or constructively deprived of counsel altogether. Leskovsky argues this claim is not precluded because it resulted in error that he characterizes variously as structural or fundamental, which he insists cannot be waived. Relying on *Stewart v. Smith*, 202 Ariz. 446, ¶ 8, 46 P.3d 1067, 1069-70 (2002), Leskovsky asserts this is a claim of significant constitutional magnitude that can only be waived personally—that is, knowingly, voluntarily, and intelligently by Leskovsky himself.

¶6 Leskovsky’s characterizations of his claim do not change its true nature. The portions of the transcript Leskovsky attached to his Rule 32 petition and petition for review show that, on the first day of trial, he had asked for a change of counsel on the ground that he did not believe counsel was prepared and that counsel had spent very little time with him. He referred to two earlier occasions on which he had also asked for new counsel. The court addressed the issue, questioning counsel about the accusations. Leskovsky’s complaints then related to counsel’s preparedness and effectiveness, rather than the existence of a

conflict between counsel and Leskovsky, and they do not support his contention that he was actually or constructively deprived of counsel. In denying Leskovsky's request for new counsel, the trial court characterized Leskovsky's claim as relating to counsel's purported ineffectiveness. The court assured Leskovsky it would permit him to "put on witnesses and evidence" at the end of trial if he were found guilty so that he could make a record to support his claim that counsel had been "deficient." Leskovsky does not contend he ever requested that opportunity.

¶7 The court continued to question Leskovsky extensively, and further discussions followed, all concerning whether trial counsel, Marshall Tandy, had been effectively representing Leskovsky up to that point. Leskovsky had written to the court earlier, in December 1990, stating he believed there was a conflict of interest involving attorney Tandy. According to Leskovsky, that conflict arose because the State Bar of Arizona purportedly had ordered Tandy to monitor the cases of another attorney whose office had caused Leskovsky to be served with a summons and complaint in a civil action. Leskovsky essentially abandoned that issue and, although he briefly referred to it at the beginning of trial during the discussion reviewed above, he did not mention it again and therefore waived it.

¶8 We agree with Leskovsky that a defendant's assertion that he was deprived of counsel is a claim of sufficient constitutional magnitude that the defendant may not be precluded from raising such a claim unless he waived it knowingly, voluntarily, and

intelligently. *See Smith*, 202 Ariz. 446, ¶ 8, 46 P.3d at 1069-70; *see also Swoopes*, 216 Ariz. 390, ¶ 22, 166 P.3d at 952. But, as we have stated, Leskovsky's claim is, essentially, a claim of ineffective assistance of counsel, not a claim of actual deprivation of counsel. In fact, Leskovsky was represented throughout the proceedings, and the record belies his claim that he was constructively deprived of counsel.

¶9 Finally, the trial court correctly rejected Leskovsky's related contention that *Torres* was a significant change in the law entitling Leskovsky to relief. In *Torres*, our supreme court addressed "[t]he question . . . whether a trial court's failure to conduct an inquiry into an indigent defendant's request to change appointed counsel mandates an automatic reversal of the defendant's conviction." 208 Ariz. 340, ¶ 1, 93 P.3d at 1057. The court concluded that automatic reversal was not required simply because there had been no hearing addressing the issue; rather, the court required a hearing to address the claim. *Id.* The court acknowledged, however, that "when there is a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel, that defendant's Sixth Amendment right to counsel has been violated." *Id.* ¶ 6. This the court characterized as structural error, which requires reversal. *Id.* But this principle was not new. The court in *Torres* relied on cases such as *State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998), and *State v. Bible*, 175 Ariz. 549, 591, 858 P.2d 1152, 1194 (1993), for this proposition. Therefore, *Torres* was not a significant change in the law, and there is no reason Leskovsky could not have raised the claim previously, either on his direct

appeal or in one of his previous petitions for post-conviction relief. Moreover, the record establishes that the trial court did, indeed, inquire into Leskovsky's complaints about counsel, effectively conducting the kind of hearing the court prescribed in *Torres*.

¶10 We conclude Leskovsky has not established that the trial court abused its discretion by denying post-conviction relief in this, his third post-conviction proceeding, or by denying Leskovsky's motion for rehearing. Although we grant the petition for review, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge